

**IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL**

Second Appeal No. 1631 of 2001

Virendra Pal Singh
S/o Sri Surat Singh
R/o Village Thati Dhanari
Evam Udalka Dhanari
Tehsil Dunda
District Uttarkashi

.....Appellant

Vs

1. Chatar Singh S/o Sri Ganga Singh
R/o Dusalgaon Dhanari, Uttarkashi
At present Main Market
Uttarkashi Town
District Uttarkashi
 2. Shiv Singh S/o Sri Mann Singh
R/o Dusalgaon, Dhanari, Uttarkashi
At present Main Market
Uttarkashi Town
District Uttarkashi
- Respondents

Sri Rajendra Dobhal, learned counsel for the appellant

Hon'ble B.C.Kandpal, J.

This second appeal has been preferred by the appellant against the judgment and decree dated 17.10.2001 passed by District Judge, Uttarkashi in Civil Appeal No. 21 of 1998 Virendra Pal Singh Vs Chatar Singh & another thereby dismissing the appeal and confirmed the judgment and decree dated 21.11.1998 passed by Civil Judge (Junior Division), Uttarkashi in Original Suit No. 8 of 1997.

2. Brief facts of the case are that the appellant-Virendra Pal Singh filed a suit before the Civil Judge (J.D.), Uttarkashi with the allegations that he was owner in possession along with co-sharers in respect of Khasra Nos. 2036, 2037, 2038 and 2039. The family partition took place long back and all the co-sharers were put in possession of their respective shares. One double story building owned by the plaintiff is situated in some portion of Khasra Nos. 2036

and 2037. The defendant No. 1- Chatar Singh purchased the property No. 1 shown which was shown in the site plan and property No. 9 was purchased by defendant No. 2 – Sri Shiv Singh. Rests of the properties shown as 2, 3, 4, 10 and 11 were also purchased by the different persons from the co-sharers. There is a pathway about 1.12 mt. Wide between the properties, which was linked with the main road. During October, 1996 tenants of the plaintiff complained him about obstruction being created by the defendants for the use of said pathway and in the month November, 1996 they installed iron gate. Due to non availability of pathway, the tenant of the plaintiff's vacated the premises and thus the plaintiff is suffering a loss of 1,600/- per month from December, 1996 . Therefore the plaintiff – Virendra Pal Singh filed a suit for permanent injunction directing the defendants to remove the gate and also for prohibitory injunction against them. Decree of mesne profit @ Rs. 1,600/- per month from December, 1996 has also been claimed.

3. The defendants contested the suit and filed their respective written statements. The defendant No. 1 in his written statement submitted that the property No. 1 was purchased by him from Sri Krishan but he denied that there was any pathway for the use of the plaintiff. He has further pleaded that he was constructed house after taking approval from the Nagar Palika and the plaintiff has no right to use the same. Defendant No. 2 also filed his written statement and contended that plaintiff had separate pathway but out of greed of money he constructed some shops and closed his pathway, which was connecting from other side to the main road.

4. On the basis of the pleadings submitted by both the parties, relevant issues were framed by the court below.

5. After having considered the entire material available on record and after hearing learned counsel for the parties, the trial court dismissed the suit of the plaintiff vide judgment and decree dated 21.11.1998

6. Feeling aggrieved by the aforesaid judgment and decree, the plaintiff/appellant filed an appeal before the appellate court which was also dismissed vide judgment and decree dated 17.10.2001 by the appellate court.

7. Aggrieved by the aforesaid judgments and decrees the appellant preferred this second appeal before this Court.

8. Heard Sri Rajendra Dobhal, learned counsel for the appellant and perused the record.

9. Learned counsel for the appellant has firstly argued that the lower court has committed jurisdictional error. The court below has not discussed the evidence and therefore, the judgment and decree is liable to set aside.

10. It is not disputed that the property No. 1 owned by defendant No. 1 was sold to him by Sri Krishan Singh (which is paper No. 42-C) and property owned by defendant No. 2 was sold by the father of defendant No. 2- Sri Mann Singh by the co-sharer. On the perusal of the sale deed paper No. 42-C by which the property owned by defendant No. 1 goes to show that no pathway is shown towards the south of this property. Learned counsel for the appellant has submitted that this disputed pathway is situated towards the south of the property of defendant No. 1 and therefore, if such pathway had existed at the time of sale deed, the same should have been shown towards the south of the property, D.W.1 –

Chatar Singh has stated in his statement that defendant No. 2 has not left any land towards the north of the house and pathway shown in the map has been left by him as per direction of Nagar Palika at the time of approval of the map for his own use. Defendants have alleged that plaintiff had separate way towards the main road, but to earn rent, the plaintiff constructed a shop in that Gali and himself closed his way. P.W.2 – Pratap Sing has stated in his statement that the plaintiff had a way which opened towards the main market. There was also a gate on this pathway. P.W.2- Awatar Singh is also tenant in the same vicinity who has stated in his statement that there was a way towards the main road, but later on the plaintiff himself constructed shops, therefore, the way was closed.

11. The trial court after having considered all the material available on record came to the conclusion that the properties of the plaintiff are situated on the main road and he could have used a portion of his property as way for approaching to the main road. The trial court has rightly held that it cannot be said that this way has become a public way particularly, when the defendant No. 1 has installed a iron gate on its opening to Jarh Bharat Road long back, therefore, the suit of the plaintiff has been rightly dismissed. The appellate Court also affirmed the finding of facts recorded by the trial court.

12. In view of the assessment of the evidence available on record, I come to the conclusion that there is no infirmity in the impugned judgments and decrees passed by the courts below. Both the courts below recorded concurrent finding of fact which cannot be interfered at the stage of second appeal.

No substantial question of law in this second appeal is involved.

13. Thus the second appeal lacks merit and is liable to be dismissed.

14. Accordingly, the second appeal is dismissed in-limine.

(B.C. Kandpal, J.)

27.10.2006
ASWAL